**Protecting sovereignty in Pacific Island states:**

**the role of parliaments in approving binding trade agreements**

*A Work-in-Progress Report*

*Pacific Constitutions Research Network Conference*

*University of the South Pacific (Emalus Campus)*

*23-25 November 2016*

Claire Slatter

*School of Government, Development and International Affairs*

*USP*

**Introduction**

Trade treaties have worryingly far-reaching social, economic and political implications for Pacific Islands states and societies. Unlike international human rights treaties, which oblige states parties to bring domestic laws and policies into conformity with the treaty, but permit ratification with reservations, rely on periodic reporting to treaty bodies to encourage greater compliance, and do not penalize states for non-compliance, international trade treaties lock states into binding agreements that can deprive them of ‘regulatory sovereignty’ (Kelsey 2016), demand and enforce compliance, and expose states to the risk of legal action and heavy fines for breaches. As such, trade agreements should not be left to trade officials to secretly negotiate and agree on. Public approval processes, which include opportunity for public submissions and debate, are crucial.

PACER Plus is a binding regional trade agreement between the region’s two developed countries (Australia and New Zealand) and the 14 Small Island Developing States (PSIDS) of Oceania. Negotiations among Pacific Island government trade officials on PACER Plus have been going on behind closed doors *over the last seven years* without any public knowledge and therefore no public debate on the contents of this far reaching trade agreement.

This paper, which is a work in progress, was inspired by political developments in the lead up to what was expected to be the concluding meeting on PACER Plus negotiations in Christchurch on 26 August 2016. Namely, the announcement by Vanuatu’s Minister of Lands and Natural Resources, Ralph Regenvanu, that Vanuatu’s Council of Ministers (Cabinet) had decided not to proceed further with regional trade talks on PACER-Plus until they had read and had done a ‘proper analysis’ of the full text.[[1]](#footnote-1) This put a brake on the intentional acceleration of PACER Plus negotiations by the Office of the Chief Trade Negotiator (OCTA) which seemed intent on securing full agreement on the negotiated text by all Pacific Islands states before the end of the year, when the contract of Chief Trade Advisor, Edwini Kessie, is due to expire.

Vanuatu’s announcement followed PNG’s earlier withdrawal from PACER Plus negotiations on the grounds that it offers PNG nothing.[[2]](#footnote-2) Fiji followed suit, saying it was not happy about Australia and New Zealand backtracking on an initial commitment to a development-oriented PACER Plus, and refusing to make binding commitments on labour mobility and development co-operation. Fiji was also not happy about the inclusion of Most Favored Nation (MFN) rights and the exclusion of infant industry protection in the final text. [[3]](#footnote-3)

But Vanuatu’s pullback was different. It was first of all reminiscent of its suspension of negotiations on WTO accession more than 10 years earlier in response to the unacceptable request by the EU in pre-accession bilateral negotiations that Vanuatu open up customary-owned land to foreign buyers. It also signaled a precautionary approach, a concern to more closely study the wider and longer term implications of the proposed draft agreement for Vanuatu, and even more significantly, a recognition of the need for greater transparency in trade negotiations and for a stronger scrutiny role by elected representatives. This stance, linked to Vanuatu’s constitutional requirement of parliamentary approval for international treaties, raises attention to the binding nature of international trade agreements, and its serious implications for the sovereign right of states to regulate in the national interest (Kelsey 2016) and for democratic governance more generally.

This paper offers a very preliminary review of the requirements that exist within Pacific Island Constitutions for parliamentary approval of international treaties, and compare them with what I have been able to gather on the parliamentary approval processes/requirements in Australia, New Zealand and the UK. The underlying questions are whether provisions that exist within the constitutions of Pacific Island states provide adequate processes for full scrutiny both by parliaments and the general public, prior to ratification of binding international trade treaties; and whether Pacific Island constitutions specifically protect the sovereign right of states to regulate in the national interest (Kelsey 2016).

**Pacific Islands States’ constitutional requirements in relation to ratifying international treaties**

With the exception of the information on Fiji (which required updating for the 2013 Constitution), the following details are taken from Norman Girvan’s useful summary of the process required in each ACP state for EPA ratification.[[4]](#footnote-4) Only six PACP states have explicit constitutional requirements of parliamentary approval for international treaties to become binding.

* Section 51 of **Fiji’s** 2013 Constitution states that ‘an international treaty or convention binds the State *only after it has been approved by Parliament’*.
* Article IX Section 2 of the Constitution of the **FSM** vests the power to ratify a treaty in its Congress.
* Section 117 of **PNG’s** constitution provides that “the consent of Papua New Guinea to be bound as a party to a treaty *can be given only by the Head of State, an authorized Minister, or “otherwise in accordance with international law, usage and practice”.* Prior to consent being given, however, a treaty document *must have been presented to Parliament* ***for at least ten sitting days’***, although these requirements may be waived ‘in exceptional circumstances’. [[5]](#footnote-5)
* In **Palau’s** Constitution, the consent (majority vote) of ‘the Olbiil Era Kelulau (OEK – the legislative body) is required to ratify an international treaty (Article VIII Section 7 of the Constitution).’
* Article 39 (Treaties) of the **Tongan** Constitution makes it “lawful for the King to make treaties with Foreign States provided that such treaties shall be in accordance with the laws of the Kingdom” but proscribes altering customs duties without the consent of the Legislative Assembly.
* Article 26 of **Vanuatu’s** Constitution requires treaties negotiated by the Government to be presented to Parliament for ratification when they:
	+ concern international organisations, peace ***or trade***;
	+ commit the expenditure of public funds;
	+ affect the status of people;
	+ require amendment of the laws of the Republic of Vanuatu; or
	+ provide for the transfer, exchange or annexing of territory.

Under Article 21(3) of the Constitution, a simple majority is required to approve an international treaty.

None of the constitutions of these six Pacific Island states requires public consultation on treaties prior to approval by Parliament or the Head of State, and only Papua New Guinea’s constitution requires a treaty to be presented to Parliament for a specific minimum number of sitting days.

The constitutions of **Kiribati[[6]](#footnote-6),** **Niue**, **Samoa,** **Solomon Islands and** **Tuvalu** make no mention at all of the treaty process. The only reference to international treaties in the constitution of the **RMI** states, “No treaty or other international agreement which is finally accepted by or on behalf of the Republic on or after the effective date of this constitution shall, of itself, have the force of law in the Republic.”

This preliminary scan of the provisions in Pacific Island constitutions for a scrutiny role by the parliament in respect to international treaties suggests a weak role by the legislature and a largely executive driven treaty making process. The statement made by Vanuatu’s Minister for Lands and Natural Resources explaining the Cabinet’s withdrawal from PACER Plus, exposed a major weakness with its parliamentary approval process for treaties – in that even the executive in Vanuatu plays no scrutiny role:

“Vanuatu wants all of the Government MPs to view the whole text before it decides whether to join or not. A Council of Ministers decision a fortnight ago said exactly that when chief negotiator Sumbue Antas released drafts of some of the texts to Government MPs at that time….*In the past, Government MPs have never seen the texts of these trade details before they are signed by trade officials, and then the minister responsible. They are then just obliged to vote on them in Parliament, without actually seeing them in full first of all.* The Council of Ministers is now getting big issues like this one, PACER-Plus, better into perspective. Elected MPs will actually have the advantage of seeing what they are voting on first of all: the full text, and in writing. They will know it all before they vote on it.”

Ralph Regenvanu, Minister of Lands and Natural Resources

*Vanuatu Daily Post*/Pacnews, 28 August 2016 [[7]](#footnote-7)

Given the far-reaching implications of trade treaties, the facts that they are negotiated in secret, agreed to and signed by trade officials, and subsequently the Trade Minister, and then simply rubber stamped by government MPs in Parliament are deeply concerning. They raise serious questions about transparency and accountability – the two fundamental principles are the heart of ‘good governance’ rhetoric and practice.

**Provisions for Parliamentary Scrutiny of Treaties in Australia, New Zealand and the UK**

1. It is worthwhile comparing the relatively weak provisions for treaty scrutiny and ratification within the constitutions of Pacific Island states (which collectively form one set of parties to PACER Plus) with the provisions for Parliamentary scrutiny of trade treaties in Australian and New Zealand, the two developed states which together constitute the other two parties to PACER Plus.

*The Australian Parliament and Treaty Ratification*

The Australian Parliament’s scrutiny of treaties is undertaken largely through the work of its Joint Standing Committee on Treaties (JSCOT), established in 1996. According to a recent Australian Parliamentary Report on the history of the JSCOT, most treaties it has examined in the last 20 years have been ‘non-controversial’, although it highlights the importance of parliamentary oversight, and of the scrutiny function of JSCOT in the light of more recent challenges (Commonwealth of Australia 2016:34). The following details on Australia’s Parliamentary procedures for the scrutiny of treaties is taken form the above-cited report.

Under a process introduced in 2002 (and formalized between 2008 and 2009), treaties are categorized into three types and how much attention is given to each is determined by the category into which it falls. Category 1treaties are tabled for 20 joint sitting days for scrutiny, as compared with Category 2 treaties which are ‘non-controversial’ and ‘routine in form’ and tabled for 15 joint sitting days. Category 3 treaties are those considered not to ‘impact significantly on the national interest and … likely to have negligible financial or legal effect within Australia’ or to involve minor amendments to treaties to which Australia is already a party (p18). Category 1 treaty scrutiny requires a National Interest Analysis (NIA) to be provided to JSCOT, indicating its ‘legal effects and potential areas of conflict with State and Territory laws’

Except for Category 3 treaties or treaty actions, which do not require enquiry, public submissions are received and heard through a public enquiry process, involving public hearings in different cities across Australia.

The work of the JSCOT, and particularly the requirements of a ‘National Interest Analysis’, and of an enquiry process involving public hearings and submissions, suggest a thorough scrutiny process by the Australian Parliament.

In the last 20 years, JSCOT has examined a number of trade treaties, among them, the controversial, OECD-initiated Multilateral Agreement on Investment (MAI), which was torpedoed after massive civil society protests followed the leak of its contents by Canadian CSOs. The ‘largest inquiry of [Australia’s] Parliament—and one of the most comprehensive in the history of the [JSCOT]’ was ‘an examination of the many ways Australia interacted with the WTO’ (five years after its establishment). It drew ‘a large public response’, involved public hearings in 5 cities, 4 public forums, and 5 expert roundtables on specific issues, and the JSCOT received 319 submissions. In its report on this enquiry, the JSCOT considered the pros and cons of globalization, and of the WTO, concluding that the former was ‘inevitable’. Interestingly, and no doubt in response to concerns raised in the submissions, it expressed concern about ‘the impact of the WTO on developing nations, particularly specific WTO agreements relating to services and intellectual property’ and considered ‘a number of actions that Australia could take through its aid program to assist developing countries to participate in the WTO and take advantage of the Special and Differential Treatment provisions.’[[8]](#footnote-8) (pp30-31)

Public concerns that Australia be ‘a good international citizen, and treat … other [developing] countries fairly’ have also emerged in JSCOT’s enquiries, e.g. into the Timor Sea Treaties, when submittees “wanted to ensure that Australia was treating East Timor fairly, and not taking advantage of its fragility.” These concerns were recorded by JSCOT as ‘relevant considerations for the Committee when inquiring into treaties’.

The JSCOT is reported as having called for ‘greater transparency in treaty negotiations, *particularly trade treaties*’ and as having recommended that ‘prior to commencing negotiations for a new agreement, the Government table in Parliament a document setting out its priorities and objectives, including the anticipated costs and benefits of the agreement’ (p51). Following an Inquiry in 2012 into the Treaties Ratification Bill, which was aimed at increasing parliamentary scrutiny of the treaty process**,** the JSCOT said‘The Governor-General must not ratify a treaty unless both Houses of the Parliament have, by resolution, approved the ratification.’

Apart from recording that PACER was among the Treaties tabled on 12 March 2002, the Report on the JSCOT makes no further reference to either PACER, or PACER Plus.

*The New Zealand Parliament and Treaty Ratification*

Auckland University Law Professor, Jane Kelsey has described the NZ Parliament’s role in treaty making as ‘largely symbolic’. Refuting John Key’s repeated assertion that the controversial Trans Pacific Partnership Agreement would have to be presented to the NZ Parliament for ratification, Kelsey said ‘the Executive, in other words the Cabinet, decides what to negotiate, instructs the officials, signs the treaty and ratifies it. The select committee process is a farcical exercise because its members know they cannot change the treaty.” <http://www.scoop.co.nz/stories/PO1403/S00429/one-more-time-pm-parliament-does-not-get-to-ratify-tppa.htm>

The New Zealand Parliament website confirms this:

“In New Zealand the power to take binding treaty action (that is, ratification, accession, acceptance, approval, withdrawal or denunciation or, in the case of bilateral treaties, signature) rests with the Executive, while the power to enact legislation necessary to *implement* treaties rests with Parliament”. <https://www.parliament.nz/resource/0000177495>

The treaty making/ratification process for free trade treaties (FTAs) is described at length on the Parliament website in a way that may suggest adequate parliamentary oversight:

* MFAT (with other government agencies) conducts ‘a wide-ranging consultation programme’ to inform *public stakeholders* of the negotiations, its objectives and possible timetables, and to seek views on the possible content of the FTA.
* The Trade Minister, together with the Minister of Foreign Affairs, then seek *Cabinet approval* of “the formal steps involved in taking the proposed treaty action” and of a National Interest Analysis (to be presented to the House of Representatives “*if required”)*
* ‘All multilateral treaties and major bilateral treaties of particular significance are required to be presented to the House of Representatives before binding treaty action is taken’. *The Minister of Foreign Affairs determines what constitutes a “major bilateral treaty of particular significance*” (criteria include whether its likely to be ‘of major interest to the public’, or whether the Foreign Affairs, Defence and Trade Select Committee of the House has indicated interest in examining the treaty).
* If the treaty is presented to the House, it is referred to the Foreign Affairs, Defence and Trade Select Committee which *may* *inquire into it*, and the government normally refrains from taking any binding treaty action until the committee has reported, or 15 sitting days from the date of the presentation has elapsed. Should the Committee indicate it needs more time, the government *may consider deferring* taking binding treaty action. The House itself *may wish* to have discussion of the proposed treaty action by way of debate.
* If the select committee makes recommendations to the government in its reports, a government response to the recommendations must be tabled within 90 days of the report.
* ‘The government will not take binding treaty action until legislation required to enable New Zealand to fulfil the obligations under the treaty has been passed’ – this last statement appears to contradict the opening statement that power to take binding treaty action *rests with the executive*.

*The British Parliament*

The UK Parliament plays no formal role in treaty-making – power is vested in the executive which acts ‘on behalf of the Crown’. Parliament of course votes on changes that may be required in UK legislation or on the use of public money as a consequence of treaties. It can otherwise ‘only overcome the will of the executive to conclude a particular treaty by expressing disapproval and relying on political pressure to change the mind of ministers, or, in the extreme case, by withdrawing its confidence from them’ (House of Commons 2010).

Parliamentary scrutiny of treaties by the British parliament appears to be mostly focused on:

1.  Treaties which affect revenue such as bilateral agreements to avoid double taxation.
2.  Treaties that require a change to domestic legislation

. Treaties which stipulate Parliamentary approval – i.e. those which are ‘of a political nature and … known to be controversial’, the government ‘may wish to safeguard its position by writing an express requirement for parliamentary approval into the text’.

**Some concluding comments**

The picture that emerges from this very preliminary look at the role of parliaments in treaty ratification suggests a pronounced weakness in the oversight and scrutiny role of national legislatures, which is particularly concerning in relation to binding trade treaties. This may be partly explained by the growing power of the executive vis a vis the legislature. But it is, I suggest, mostly explained by the relatively recent emergence of binding free trade treaties and the global free trade agenda ushered in by the formation of the World Trade Organisation in 1995. This agenda has been actively advanced by OECD states, in their own self interest, or more correctly in the interest of corporate interests within these states, and reflects the dominance of neoliberalism.

In pushing this agenda, as an economic rationalist schema for growing the global economy purportedly in the interests of all, there has been too little attention given by states to strengthening political safeguards for themselves against being pushed into agreeing to binding trade treaties. For developing states, and especially for PSIDS, the implications of binding trade treaties, which are often negotiated between highly unequal partners, and often rather coercively, are enormous. Not only do they result in agreeing to tariff reductions which may substantially reduce state revenue, open economies to imported goods which may threaten domestic industries and cause job losses, and affect the health and wellbeing of their peoples, but most worryingly, they constrain governments from regulating in the national interest post-ratification. This used to be referred to a closing of ‘policy space’ but it is now more correctly spoken of in terms of denying the sovereign right of states to ‘regulate in the national interest’ - whether to protect the environment, landowner interests, domestic industries etc). The longterm implications of binding treaties and their punitive measures (e.g. being sued by corporatations in a investment disputes court) are one of the most serious concerns.

Consider for instance this, under the draft chapters of PACER Plus which were leaked earlier in the year, foreign investors were to “enjoy equal treatment with investors who are nationals, be permitted to expatriate profits, be legally protected from expropriation or nationalization of their investments, and be entitled to compensation should they suffer such a loss” (*Defending Pacific Ways of Life*, 2016). Incredibly, as pointed out in PANG’s People’s Social Impact Assessment, the definition of ‘an investor’ included ‘an intending investor’, while the definition of investment included ‘*the expectation* of gain or profit’ (ibid). OCTA has denied that the final text of PACER Plus includes these provisions. One hopes this is so, as these provisions, which were certainly in the leaked earlier draft of PACER Plus, would have made any Pacific Island state that legislated to protect national interests post-ratification liable to compensating intending investors for their estimated/ expected ‘losses’.

When considering constitutional reforms, it would be prudent for Pacific Island states to give serious attention to including constitutional protection of the right to regulate in the national interest.

**References**

|  |
| --- |
| Commonwealth of Australia (2016) A history of the Joint Standing Committee on Treaties: 20 years, Report 160, http://creativecommons.org/licenses/by-nc-nd/3.0/au/. Girvan, Norman (nd) ‘Ratification of EPAs: the process required in each ACP state, Advocates for International Development, Hironori Yamamoto (2007) ***Tools for parliamentary Oversight:a comparative study of 88 national parliaments***, Inter-Parliamentary Union, Geneva.  |
| House of Commons Information Office (2010) *Treaties*, Factsheet on the Law of Treaties., Procedure Series. New Zealand Parliament (2009) The Treaty making process in New Zealand, <https://www.parliament.nz/resource/0000177495> ‘One more time, PM: Parliament does not get to ratify TPPA’<http://www.scoop.co.nz/stories/PO1403/S00429/one-more-time-pm-parliament-does-not-get-to-ratify-tppa.htm> |

PANG (2016) *Defending Pacific Ways of Life:  A Peoples Social Impact Assessment of PACER-Plus****,*** A report commissioned by the Pacific Network on Globalisation (PANG), Suva.

*Vanuatu Daily Post* /PACNEWS, *Talks close: Vanuatu undecided on PACER-Plus* 28 August 2016, <http://www.pina.com.fj/?p=pacnews&m=read&o=105790167957c38bc4675675151148>

1. See interview with Vanuatu's Minister of Lands and Natural Resources, Ralph Regenvanu, August 30, 2016 <https://www.youtube.com/watch?v=W6J9jqpkV1A&feature=youtu.be> [↑](#footnote-ref-1)
2. PNG said that, in its present iteration, PACER Plus offered it no benefits at all. [↑](#footnote-ref-2)
3. See <http://www.abc.net.au/news/2016-09-11/fiji-withdraws-from-pacer-plus/7835704>. [↑](#footnote-ref-3)
4. See Girvan, n.d.*Ratification of EPAs: the process required in each ACP State*, [↑](#footnote-ref-4)
5. “If Parliament has by absolute majority waived the requirements, if the matter is sufficiently urgent, or if compliance with the requirements would not be in the national interest.” (Girvan, n.d.). [↑](#footnote-ref-5)
6. **Kiribati’s** Constitution also makes no mention of treaties although Section 138 which concerns ‘amending and revoking instruments, etc.’ reads: “Where any power is conferred by this Constitution to make any proclamation, *regulation,* order or rule, or to give any direction or instructions, the power shall be construed as including the power, exercisable in like manner, to amend or revoke any such proclamation, regulation, order, rule, direction or instructions”. [↑](#footnote-ref-6)
7. <http://www.pina.com.fj/?p=pacnews&m=read&o=105790167957c38bc4675675151148> [↑](#footnote-ref-7)
8. Other treaties considered by the JSCOT included a pre-signed bilateral subsidiary longline fisheries agreement with Japan for which the government had sought exemption from National Interest Analysis), the UN Convention on the Rights of the Child, , the [Rome] Statute of the ICC, Extradition Treaties, the Kyoto Protocol, the Timor Sea Treaties, Australia-Indonesia Framework on Security Cooperation, the nuclear non-proliferation and disarmament treaties, the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment . [↑](#footnote-ref-8)